

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN FREDERICK EBERLEIN,

Defendant-Appellant.

UNPUBLISHED
February 20, 2007

No. 265276
Kent Circuit Court
LC No. 04-004384-FH

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to six months in the Kent County jail, and 60 months of probation. We affirm.

Several months prior to being charged in this case, defendant was the subject of an incident report filed with police regarding his 15-year-old niece. Defendant told his niece that he loved her “as a girlfriend,” put his hand on her knee, and, at one time, bought her a revealing bikini. He later stared at her in the rearview mirror of a car. The girl’s mother filed a police report, and asked police to warn defendant to stay away from the girl. Defendant admitted to police that the incident report was accurate and promised to stay away from the girl. Later, defendant was charged in this case with having sexual contact with the niece’s younger brother, defendant’s 7-year-old nephew. While being questioned by police, defendant explained that “his feelings may have transferred from [the niece] over to [the victim].”

Defendant first argues on appeal that the trial court abused its discretion by denying defendant’s request for a *Ginther*¹ hearing. We disagree. Claims of ineffective assistance of counsel require a defendant to show that counsel’s performance fell below an objective standard of reasonableness and that the representation prejudiced defendant such that he was deprived of a fair trial. See *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). A defendant must make a testimonial record at the trial court level to support his claims of ineffective assistance of counsel. *Ginther*, *supra* at 443.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Of the six claimed bases of ineffective assistance offered by defendant, he failed to present any offers of proof for five of those bases. This Court will not require a trial court to conduct a hearing regarding the effectiveness of counsel without a proper offer of proof. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985). Defendant's remaining claimed basis of ineffective assistance of counsel was that defense counsel failed to introduce a letter written by defendant's wife into evidence. Defendant proffered that letter to the trial court when requesting a new trial. The factual premise of defendant's claim was that the victim's mother invented the charged abuse and then told the victim that it happened. The burden of establishing the factual predicate for a claim of ineffective assistance of counsel falls on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The letter at issue was written with respect to a custody issue, and appeared irrelevant to the criminal charge. Defendant did not establish that an evidentiary hearing would reveal more information to support his claim, and he failed to establish the factual predicate for the claim. Neither a remand for a *Ginther* hearing nor a new trial is warranted on the claimed ineffective assistance of counsel.

Defendant next argues that the trial court erred by ruling that the evidence of defendant's relationship with the niece was admissible pursuant to MRE 404(b). A trial court's decision to admit or exclude evidence is reviewed for a clear abuse of discretion. *People v Houston*, 261 Mich App 463, 465; 683 NW2d 192 (2004). An abuse of discretion occurs when a trial court chooses an outcome that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Houston*, *supra* at 466.

Evidence of other crimes, wrongs, or acts of a defendant is inadmissible to prove a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), citing MRE 404(b). Other-acts evidence, nonetheless, is admissible for purposes other than to show conformity with character. MRE 404(b)(1). In order to be admissible under MRE 404(b), other acts evidence must (1) be offered for a proper purpose; (2) be relevant under MRE 402 as enforced through MRE 104(b); (3) not have its probative value substantially outweighed by unfair prejudice; and (4) the trial court may, upon request, provide a limiting instruction to the jury. *Crawford*, *supra* at 385. Because MRE 404(b) is a rule of inclusion rather than exclusion, the evidence need be admissible only under one theory. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001).

The evidence of defendant's other acts toward his niece was offered for the proper purpose of showing motive. The evidence was thus relevant for a purpose other than to show defendant's character. The other-acts evidence concerning defendant's inappropriate acts toward his niece were relevant to explain the feelings defendant claimed that he transferred from his niece to his nephew. Without the testimony about defendant's admitted prior acts toward his niece, the jury would not understand the significance of defendant's incriminating statement and would be left with a "conceptual void." *People v Starr*, 457 Mich 490, 502; 577 NW2d 673 (1998). Moreover, we cannot conclude that the trial court abused its discretion by ruling that the probative value of the evidence was not substantially outweighed by unfair prejudice. Defense counsel rightly pointed out at trial that, although his acts toward his niece were inappropriate, defendant never touched his niece in a sexual way. And, the probative value of the evidence as proof of motive was high. There was no abuse of discretion in the admission of the challenged evidence.

Finally, defendant argues, for the first time on appeal, that the prosecutor committed misconduct by continually referring to defendant's relationship with his niece when he knew that the relationship did not include criminal conduct. Defendant's two-paragraph argument on this unpreserved issue is cursory and does not explain or rationalize defendant's position. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski
/s/ Christopher M. Murray